United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24068

UNITED STATES OF AMERICA

v

EMANUEL DURANT

Appellant

On Appeal from Judgment of Conviction
of the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

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QUESTION PRESENTED

1. Was the evidence introduced in this case sufficient as a matter of law to sustain a conviction of assault with a dangerous weapon in violation of 22 D. C. Code §502 and carrying a dangerous weapon without a license therefor issued as provided by law in violation of 22 D. C. Code §3204.

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Appellant

On Appeal from Judgment of Conviction
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Jurisdiction of this appeal is vested in this Court by virtue of 28 U.S.C. §1291. On February 25, 1970, the United States District Court for the District of Columbia entered a judgment of conviction of appellant upon his plea of not guilty and a verdict of guilty to the offenses of assault with a dangerous weapon and carrying a dangerous weapon from which such judgment this appeal is taken.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The Court below erred in denying appellant's motion for a judgment of acquittal made after the conclusion of the Government's evidence.

2. The Court below erred in denying appellant's motion for a judgment of acquittal after the conclusion of appellant's case.

This matter has not previously been before this Court.

REFERENCE TO RULINGS

On December 29, 1969, appellant's oral motion for a judgment of acquittal made at the conclusion of the Government's case as to all counts was denied by the court below without opinion (Tr.127). On December 30, 1969, at the conclusion of the defense's case, appellant again moved for a judgment of acquittal as to all counts. Appellant's motion was denied by the court below without opinion (Tr. 214-216). On February 25, 1970, the court below entered a judgment of conviction as to counts 3 and 4 of the indictment upon appellant's plea of not guilty as to all counts and a verdict of guilty as to counts 3 and 4.

STATEMENT OF THE CASE

On February 3, 1969, appellant, EMMANUEL DURANT, was charged in a four count indictment of assault with intent to kill, while armed with a dangerous weapon, one Abe Mandell in violation of 22 D.C. Code §3202; assault with intent to kill said Abe Mandell in violation of 22 D.C. Code §501; assault with a dangerous weapon in violation of 22 D.C. Code §502; and carrying a dangerous weapon without a license therefore issued as provided by law in violation of 22 D.C. Code §3204.

Appellant's case was tried before a jury in the United States District Court for the District of Columbia on December 29, 30, and 31, 1969. Appellant's motions for a judgment of acquittal made after the condlusion of the Government's case and after all the evidence was introduced in the case were denied by the Trial Court and the case was sent to the jury. The jury returned a guilty verdict on counts three and four of the indictment, namely, assault with a dangerous weapon and carrying a dangerous weapon and on February 25, 1970, a Judgment of Conviction was entered and appellant was committed to the custody of the Attorney General under the provisions

of the Federal Youth Corrections Act, 18 U.S.C. §5010(c), for a period of eight years.

The chief witness for the prosecution was the victim of the assault, Abe Mandell. Mr. Mandell was the manager of the Standard Drug Store at 914 F Street, N. W., Washington, D. C. Mr. Mandell testified that on February 1, 1969, he arrived at work at approximately 6:50 a.m., parked his car in the alley directly behind the building, walked up the alley to F Street, turned right and headed for the drug store where he was employed (Tr. 82). As he turned right, he saw a man standing by the bus stop which is about five feet past the building line. It was a little dark and was misty and raining at that time (Tr. 83). As he approached the store he looked again at the person he had seen standing by the bus stop. He then went up to the door and put his key in the door, looked over his shoulder and seeing no movement from this man, turned the lock and started to open the door. The man came rushing at Mandell, pushed him into the store turning Mandell back around facing F Street. The man was running so fast that his hat fell off and Mandell testified that he then recognized him as Emmanuel Durant, the

appellant, who had been working for Mandell. Mandell said "What is it you want, Emmanuel?". Before Mandell could finish his question six shots were fired at him in rapid succession. One of the bullets struck Mandell approximately four inches above his navel (Tr. 83, 84). After the shots were fired, Mandell's assailant ran out of the store and Mandell ran after him but as soon as he got out of the doorway his legs went numb and he fell partially into the street. He thereafter picked himself up, went back into the store, dialed the operator and said, "I have been shot, 914 F Street, Northwest", and hung up. As he headed for the front door, the police entered the store (Tr. 85).

Mr. Mandell identified appellant who was sitting in the court room as the person who had shot him (Tr. 85). The lighting conditions in the store on the morning he was shot were good (Tr. 87, 93).

Mr. Mandell further testified that he had seen appellant prior to the morning of February 1, 1969. Appellant worked for Mr. Mandell and had been employed for a little over three weeks. However, appellant had given Mandell a week's notice that he was going to quit on Saturday, February 1, 1969, the day of the shooting. Mandell had seen the appellant

on Wednesday, January 29, 1969, two days before the shooting (Tr. 93). During the period of time when appellant worked for Mandell, his hours were from 9:30 a.m. until 6.00 p.m. five days a week. Mandell saw appellant every day and used to drive him home at night (Tr. 94).

On cross examination Mandell testified that his assailant was wearing a jacket which seemed to be made out of cloth, or corduroy. He could not recall what color trousers his assailant had on but the whole outfit seemed to be dark in color (Tr. 105). The coat was what is normally called a three-quarter-length coat with a belt which was sewed on the back and hung freely from the side. The belt was dangling in two pieces in the front and there was no buckle on the belt (Tr. 106, 107). Mandell had never seen this outfit on appellant before (Tr. 108).

According to Mandell, appellant gave no reason as to why he was giving his notice to quit his employment (Tr. 109, 110). During the three weeks that appellant was employed by Mandell, Mandell did not have any argument or angry exchanges with him and considered appellant to be an excellent worker. Appellant never had threatened Mandell in any way (Tr. 114).

The only other witness called by the prosecution at the trial of this case was Police Officer Donald G. Bazzle. The only testimony presented by Officer Bazzle concerned the fact that he had discovered a hat and two shells inside the drug store and two empty shells outside (Tr. 116, 117). It was stipulated that a fifth shell was found inside the Standard Drug Store on February 3, 1969, ten feet inside the front door and to the left of the front door, making a total of five shells totally recovered, two outside and three inside (Tr. 122). It was also stipulated that all of the shells appeared to be of the same caliber and that appellant did not have a license to carry a pistol in the District of Columbia on February 1, 1969 (Tr. 123, 124).

The final stipulation was that if Officer Henry L. Middleton were called as a witness he would identify the hat as the one which he recovered at the scene of the offense inside the door at 914 F Street, N. W., at approximately 7:00 or 7:30 a.m. (Tr. 124, 125).

There was no other evidence presented by the prosecution and Counsel for Appellant made a motion for a judgment of acquittal as to all counts. The Court below denied the motion (Tr. 127).

Counsel for the Government and for the Defense stipulated as to the testimony of Dr. Tsangaris, a Doctor and Surgeon at the George Washington University Hospital. Dr. Tsangaris was the surgeon who, on February 1, 1969, operated on Mr. Abe Mandell for a gunshot wound. The bullet entered just below the bottom-most rib, approximately at the point where the ribs form an inverted "V" in the middle of the front of Mr. Mandell's body. The bullet did not enter either the chest cavity or the abdominal cavity but instead it travelled from its point of entry through the fatty tissue between the ribs and the outer skin and came to rest in the right side. Based upon the trajectory of the bullet, Dr. Tsangaris would testify that there would be three possibilities; First, the assailant could have been standing off to Mr. Mandell's left side when the bullet was fired, at an angle resulting in the oblique course that it took. the second possibility is that the assailant could have been standing directly in front of Mr. Mandell when the bullet was fired but that Mr. Mandell was turning towards his right; and the third possibility is, that the assailant could have been standing directly in front of Mr. Mandell and fired the gun

directly into him with the bullet being deflected by a rib and then taking the oblique course which Dr. Tsangaris found. In Dr. Tsangaris' opinion the assailant and Mr. Mandell were not standing face to face with the bullet being fired straight at the front of the victim (Tr. 152-154).

It was further stipulated between the Government and the defense as to the contents of certain radio broadcasts made on the police radio on February 1, 1969, immediately following the shooting of Abe Mandell. All police radio communications are recorded by means of a tape recorder at police headquarters, a transcript of all police radio communications taken from those tape recordings relative to the shooting at the Standard Drug Store in the early morning hours of February 1, 1969, were obtained by the Government and the defense. It was stipulated, by the Government and the defense, that the transcribed radio broadcast made at that time indicated the following:

"1. At 6:56 a.m., the radio dispatcher for the police department, stated on the police radio network that a person from the Riggs Bank had notified the police department that gunshots had been fired in the 900 block of F Street, N. W.

2. Within seconds thereafter, police officers in police scout car No. 16 (the police officers in this car were the first police officers to arrive on the scene at the Standard Drug Store), broadcast from the police radio, the following tentative lookout:

'There has been a shooting here, a man, a Negro, male, wearing a light tan jacket and black pants, heading west on F Street. Send ambulance here.'

This information was broadcast between 6:56 and 6:57 a.m. It is stipulated by the Government and the defense, that this tentative lookout was based upon information supplied to the police officers by a witness to the shooting, other than Mr. Abe Mandell.

3. It is further stipulated that the police officers who first arrived on the scene of the shooting, obtained no detailed description of the physical characteristics of the assailant, from the complaining witness, Mr. Abe Mandell. However, there are indications that Mr. Mandell told police officers who first arrived on the scene, that his assailant was the man who had recently quit his employment at the Standard Drug Store.

4. It is further stipulated by the Government and the defense, that police officers in another

scout car, that is scout car No. 42, broadcast on the police radio, between 6:59 and 7:01 a.m., another lookout for the assailant at the Standard Drug Store. This information was obtained by the police, either from the witness who provided the information broadcast by the officers in scout car 16, or, in the alternative, was based upon information provided to the officers in scout car 42, by another unknown witness to the shooting that had occurred at the Standard Drug Store. The information provided in the broadcast was:

'Additional information on that lookout: a long black leather coat, a Negro male, between 28 and 30 years old, about five feet eight inches tall: that's all at this time.'

5. It is further stipulated that very soon after 7:30 a.m., police officers in another scout car, No. 11, broadcast the following lookout:

'That was a Negro male, about 28 years old, he had a long leather trench coat on with a belt around the middle, had tan-colored pants, as soon as the owner responds, we will get a name for you. He is an ex-employee.'

The officers in scout car 11, immediately rebroadcast the lookout as follows:

'Lookout for AD' (assault with a dangerous weapon), gun, happened 900 block F, approximatlly 15 minutes ago, Lookout for one Negro male, approximately 28 to 30 years old, approximately five feet eight inches tall, subject is wearing a long black trench coat, with a belt around the waist, and tannish-colored trousers.'

6. Soon after 7:07 a.m., scout car 42 broadcast certain additional information on the police radio. The citizen who provided this information to the officers in scout 42, was either the person who provided the information for the original tentative lookout, broadcast by scout car 16, or another witness who observed the shooting, but whose identify is unknown to either the defense or to the Government. This broadcast by scout car 42 was, as follows:

'That's a lookout for a Negro male, about 28 to 30, five feet eight inches, 160, dark complexion, medium build, wearing a long black leather coat, with light tan pants. Nothing further at this time.'" (Tr. 159-161).

The defense called appellant, Emmanual Durant, as its first witness for the defense. Appellant testified that he was participating in a dice game at Second and D Streets, N. W., at the time of

the shooting of Mr. Mandell, that he had no hat on at that time but was wearing a shirt and pants and a coat which was a brown suede coat with a belt in the back and which did not come around in the front of the coat. (Tr. 166, 167, 171, 172) After he left the dice game he walked down F Street intending to walk to the Greyhound Bus Station but at Ninth and F he ran into two police officers (Tr. 169). The police officers were crossing the street from the Standard Drug Store where the shooting had occurred and appellant turned and walked across to the drug store and thereupon engaged in a conversation with one of the officers (Tr. 169). As appellant started to leave the drug store he was called back by one of the police officers and was placed under arrest (Tr. 170, 172).

Although appellant's hair was much longer on the day of the trial it was at the time Mr. Mandell was shot, it was clear to the Court below that the hat found inside the Standard Drug Store was too small to fit appellant (Tr. 175, 176). The Court below commented:

> "I have been bothered with this case too much. I do not like this prosecution. I do not like the lawsuit, either way. I think you rely too much on stipulations. I think this case could have been much more explored. I do not like the police work in this case. I do not like it, at all.

> "If this is the hat that this man had pulled down over his eyes-he said he had his coat up and his hat pulled down. Of course, we did not get into that with Mr. Mandell. You asked him what he noticed about the hat, if anything, but this hat will not fit this man. He may have had the hat on his head. This hat cannot be pulled down over this man's head. The proof of that is, when he puts his hat down, you notice the impression it leaves on his hair. This hat will not fit." (Tr. 176,177)

The defense called appellant's brother Ralph Durant as a witness who testified that during the period of time when the appellant worked at the Standard Drug Store he never had occasion to observe appellant wearing a hat, and that he had never seen the hat introduced into evidence before (Tr. 194-197). The only other witness called for the defense was Police Officer Harry Charles Seanor. At first Officer Seanor could not recall whether or not the hat fit appellant when it was tried on appellant at the time of his arrest (Tr. 202, 203), but Officer Seanor later recalled having stated to counsel for the Government and for the defense that he thought the hat did not fit appellant (Tr. 209).

At the conclusion of all the evidence, the defense once more made a motion for a judgment of acquittal as to all counts. The Court below denied the motion.

Appellant submits that the Court below erred in denying his motion for a judgment of acquittal at the conclusion of the Government's case and that the conclusion of the defense's case.

STATUTES INVOLVED

22 D. C. Code §502:

> "Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years."

22 D. C. Code §3204:

> "No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in §22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years."

SUMMARY OF ARGUMENT

Even when the evidence in this case is viewed in a light most favorable to the Government, the evidence is such that a reasonable jury must

have reasonable doubt as to the existance of all the elements of the offenses as charged and it was error for the Trial Court to let the jury act under such circumstances.

ARGUMENT

THE EVIDENCE INTRODUCED IN HIS CASE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN A CONVICTION OF ASSAULT WITH A DANGEROUS WEAPON IN VIOLATION OF 22 D. C. CODE §502, AND CARRYING A DANGEROUS WEAPON WITHOUT A LICENSE THEREFOR ISSUED AS PROVIDED BY LAW IN VIOLATION OF 22 D. C. CODE §3204.

In a criminal case, guilt must be established beyond a reasonable doubt and unless such a result is possible on the evidence presented, the Trial Court must not let the jury act. Campbell v. U. S., 115 U.S. App. D. C. 30, 310 F.2d 181 (1963). A motion for acquittal must be granted when the evidence, viewed in a light most favorable to the Government, is such that a reasonable juror must have reasonable doubt as to the existance of any of the essential elements of the offense. Austin v. U. S., 382 F.2d 129 127 U.S. App. D. C. 190 (1967). As will be discussed below, appellant submits that on the evidence introduced in this case, no reasonable juror could state that there was no reasonable doubt as to appellant's guilt.

In determining whether the evidence was sufficient to sustain appellant's conviction, it should be kept in mind that evidence introduced as a part of appellant's case should not be considered in connection with a ruling on a motion for a judgment of acquittal at the close of the Government's case. Franklin v. U. S., 330 F.2d 205 117 U.S. App. D. C. 331 (1963).

It is submitted that the Government's entire case rests on the testimony of the witness Abe Wandell who identified appellant as the person who shot him. The witness' testimony is totally uncorroborated as to appellant's identity. There is no evidence whatsoever in the records concerning any pistol and the record merely indicated that the witness had been shot by a weapon of some small caliber. There is not an iota of evidence in the record as to any motive appellant may have had for shooting Mr. Wandell. Reducing the Government's case to its most simple posture, we have before us a simple accusatory statement by one witness that Emmanuel Durant shot him. There is absolutely no other evidence in the record which has any probative value in so far as establishing appellant's guilt. Appellant submits that based upon this evidence, no reasonable juror could say that there was no reasonable doubt as to appellant's

guilt. The Court below therefor erred in denying appellant's motion for judgment of acquittal after the presentation of the Government's case and after the conclusion of all the evidence.

Appellant believes that our system of justice requires that more evidence than that produced by the Government in this case should be required before a man can be convicted of a crime. Here, a victim of a crime has pointed his finger at appellant and said, "He is the one who shot me.", but there is nothing in the records to indicate that appellant had any inclination to commit such an act or that he even had the means to accomplish it with. Certainly, the Government with all the money and resources available to it, could have introduced more evidence linking appellant to the crime if such evidence had existed.

Appellant believes that on the basis of the evidence submitted by the prosecution, standing alone, the Court below should have granted his motion for a judgment of acquittal. Even so, when the evidence introduced by the defense is also considered, it becomes much more apparent that no reasonable juror could have been free from reasonable doubt as to appellant's guilt.

Appellant's defense was that of alibi, namely, that he was shooting dice at the time of the

alleged offense. Appellant's testimony does not, however, stand alone. It should be noted that Mr. Mandell carefully pointed out that the coat worn by his assailant was made of cloth or corduroy with an untied belt hanging loose in the front. The coat appellant was wearing at the time of his arrest was a suede coat with no belt in front. Mr. Mandell's assailant wore a hat pulled down in an obvious attempt to hide his identity. The hat recovered at the scene of the crime would not fit appellant and it was clear even to the Court below that such hat could not have been pulled down in the manner described by Mr. Mandell. True, appellant's hair was longer at the time of the trial but it was still obvious that the hat was too small. This fact was corroborated by the police officer's testimony. The stipulation as to the police lookout broadcasts indicated that more than one different description of Mandell's assailant were received by the police.

Considering the record as a whole, appellant submits that a reasonable juror could not find there was an absence of reasonable doubt as to the question of whether appellant was Mr. Mandell's assailant. A reasonable juror could have easily concluded that Mr. Mandell was mistaken in this identi-

fication of appellant. Appellant thus contends that the Court below erred in denying his motion for a judgment of acquittal at the conclusion of the defense's case.

CONCLUSION

For all the reasons set forth above, appellant submits that the Court below erred in denying appellant's motion for a judgment of acquittal and that the judgment of conviction entered against appellant by the District Court should be reversed and the charges against him dismissed.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

for the District of Columbia Circuit

No. 21,089

UNITED STATES OF AMERICA, APPELLEE

v.

EMANUEL DURANT, APPELLANT

Appeal from the United States District Court
for the District of Columbia

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United States Attorney

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Assistant United States Attorneys

[illegible]

[illegible]

[illegible]

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OTHER REFERENCES

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* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

Whether the evidence against appellant was sufficient to sustain a conviction of assault with a dangerous weapon and carrying a pistol without a license.

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,068

UNITED STATES OF AMERICA, APPELLEE

v.

EMMANUEL DURANT, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a four-count indictment filed on April 14, 1969, appellant was charged with assault with intent to kill while armed (22 D.C. Code §§ 501 and 3202), assault with intent to kill (22 D.C. Code § 501), assault with a dangerous weapon (22 D.C. Code § 502), and carrying a pistol without a license (22 D.C. Code § 3204). Appellant was tried before the Honorable William B. Bryant, sitting with a jury, on December 29-31, 1969, and found guilty of assault with a dangerous weapon and carrying a pistol without a license. On February 25, 1970, appellant was sentenced to a term of eight years pursuant to the Fed-

eral Youth Corrections Act, 18 U.S.C. § 5010 (c). This appeal followed.

Pre-Trial Hearing

Before the jury was impaneled, a hearing was held to determine if the Government could establish an independent source for an in-court identification by the complaining witness, Mr. Abe Mandell (Tr. 3-42). During this hearing Mr. Mandell testified that he was employed by the Standard Drug Company at 914 F Street, N.W. At about 6:50 a.m. on February 1, 1969, after parking his automobile in the rear of the drug store and walking through an alley to the front of the store, he observed a man leaning against the post at the bus stop twenty to twenty-five feet from the store doorway (Tr. 10). The man's collar was turned up; he was wearing a hat, and he was standing in such a position that Mr. Mandell had only a side view (Tr. 13-14). At that time Mr. Mandell could not identify the man (Tr. 14). As Mr. Mandell unlocked the door to the store, from the side of his eye he saw something coming at him, and the first thing he knew, he was shoved into the store by the unknown man (Tr. 15-16). As the man pushed Mr. Mandell into the store, the hat that the man was wearing fell off, and Mr. Mandell recognized him as appellant, Emmanuel Durant, a former employee of the store (Tr. 16, 26-28, 31). Mr. Mandell asked, "Emmanuel, what is it you want?", and at that time appellant started shooting. Mr. Mandell was standing approximately four and one-half feet from appellant, facing him (Tr. 16). In self-defense Mr. Mandell swung his lunch box at appellant while appellant fired six shots from a gun covered by a small paper bag (Tr. 16-17). Appellant then pushed Mr. Mandell aside and ran from the store (Tr. 18).

Mr. Mandell attempted to go after appellant, but when he got outside his legs went numb and he fell to the ground (Tr. 17). Mr. Mandell got up, went back inside, dialed the operator and informed her of the shooting (Tr.

30). After the police arrived, Mr. Mandell told the officer:

> I know, definitely who this man was who shot me, and I don't know how seriously I am shot. . . . If anything happens, I will give you this man's name. . . . Get your tablet and pencil out. . . . E-M-M-A-N-U-E-L Durant. He was a former employee here. (Tr. 31.)

Mr. Mandell testified that on the morning of the shooting appellant was wearing a hat and a light brown corduroy coat with a half-belt that swung open (Tr. 20-21). Mr. Mandell, however, could not be sure of the colors because he is color blind (Tr. 21). By the time he assaulted Mr. Mandell, appellant's collar was no longer up, and Mr. Mandell remembered clearly seeing his face (Tr. 21). Mr. Mandell also testified that appellant had worked for him at his store for three and one-half weeks prior to the shooting incident (Tr. 26-27). He had driven appellant home frequently (Tr. 28). He also testified that in front of the store "the lighting conditions were almost brighter than daylight" (Tr. 29). In the entrance there were three fixtures with twelve eight-foot lights on fluorescent tubes. These lights were lit on the morning of February 1, 1969 (Tr. 29).

The trial court ruled that the in-court identification was admissible:

> THE COURT: I think he had ample opportunity. I think seeing a man face to face, under the circumstances he indicated, although not for a long period of time, it is a sufficient period of time. He said he called him by name just a split second before the shooting began.
>
> MR. SHINE [defense counsel]: When you say "sufficient opportunity," do you mean opportunity to observe?
>
> THE COURT: Sufficient opportunity to recognize him. For instance, if you and I know each other, and I don't think I would have, or need to look at you at a distance of four feet, more than, virtually,

a split second, without recognizing you. I either know you or I do not know you.

This is not the usual mistaken identity, as when you have somebody you have known over a period of years, walking down the street or passing you at a distance and looking at you from the side, or that type thing, or you see somebody in the car who yells at you.

This man was looking right at him, four feet, face to face, and it would be rather reckless for me to say he could not recognize him. (Tr. 42.)

The Trial

The Government's Case

The jury was then impaneled and the trial began. Mr. Abe Mandell testified before the jury, presenting substantially the same evidence as he gave at the pre-trial hearing. He discussed his arrival at work (Tr. 81), his observations of an unknown male at the bus stop (Tr. 83), the attack and the shooting (Tr. 84-85). He testified that he chased after appellant, but his leg went numb, and he went sprawling on the street (Tr. 85). He then picked himself up, went inside the store and called the operator (Tr. 85).

Mr. Mandell further testified that only one bullet struck him and that this bullet found its mark about four inches above the navel (Tr. 84-85). By swinging his lunch kit at appellant, he managed to avert the other bullets (Tr. 84). He also testified that he was color-blind (Tr. 86). He then positively identified appellant as the man who shot him (Tr. 86). After describing the lighting conditions in front of the store (Tr. 87), Mr. Mandell testified that they were better than the lighting conditions in the courtroom (Tr. 93). He also testified that appellant had worked for him for a little over three weeks, and that he saw appellant many times in the course of the working day (Tr. 93-94).

On cross examination Mr. Mandell testified that appellant was wearing a three-quarter length coat, and, although he did not notice much about the coat since he

was fighting for his life (Tr. 106), he did observe that it was probably corduroy and had a belt hanging freely from the side (Tr. 107). On redirect examination Mr. Mandell stated that when he originally saw appellant standing at the bus stop, he tried to see his face but could not because his coat collar was up, and his hat was pulled down and his head was drooping (Tr. 115).

Officer Donald G. Bazzle of the Metropolitan Police testified that on February 1, 1969, shortly after 7:00 o'clock in the morning, he responded to the Standard Drug Store at 9th and F Streets, N.W. He examined the scene and found a hat and two empty shells inside the drug store, and two empty shells outside the store (Tr. 117). The hat was found approximately four feet inside the front door (Tr. 118). It was stipulated that, in addition to the four shells found by Officer Bazzle, there was a fifth shell found by the police on February 3 inside the front door, making a total of three shells recovered from inside the store and two shells from outside (Tr. 123-124). It was also stipulated that all the shells appeared to be of the same caliber and that appellant did not have a license to carry a pistol in the District of Columbia (Tr. 123). The final stipulation was that if Officer Henry L. Middleton were called, he would testify that he could identify the Government's exhibit as the hat found at the scene of the offense (Tr. 124).

After the Government rested, the defense made a motion for a judgment of acquittal on all counts which was denied (Tr. 127).

It was then stipulated that Dr. Tsangaris would testify that he operated on Mr. Mandell on February 1, 1969, and that he removed one bullet from the rib area. The bullet traveled from its point of entry through the fatty tissue between the ribs and the outer skin and came to rest in the right side (Tr. 153). There were three possibilities as to where the assailant was standing:

(1) off to Mr. Mandell's left side, (2) directly in front of Mr. Mandell with Mr. Mandell turning to his right, and (3) directly in front of Mr. Mandell [1] (Tr. 153).

It was also stipulated that inconsistent lookout descriptions were sent over the police radio and that some of the lookout information was supplied by a witness other than Mr. Mandell (Tr. 159-161).

The Defense

Appellant testified that he had been employed by Standard Drug Store but quit because the pay was not good (Tr. 165). In the early morning hours of February 1, 1969, he went to the Greyhound depot to "hang around". He arrived at the depot at about 1:30 and stayed there until approximately 2:45 or 3:00 o'clock in the morning, when he went with another individual to a dice game at "Third and D or Second and D, N.W." (Tr. 166). He played dice until 7:30 in the morning, went to a party in the same building for a few minutes, and left the building at approximately 7:45 a.m., headed again for the Greyhound depot (Tr. 168). However, he never reached his destination, for as he passed the Standard Drug Store, he met two police officers (Tr. 168). He went over to the front of the drug store, "just being nosy" (Tr. 169), and asked the officers what had happened. He was asked by the police to come inside the store and, after he complied, was placed under arrest (Tr. 170-171).

Appellant testified that when arrested, he was wearing a coat jacket, shirt and pants and that his hair was shorter (Tr. 172-173). While he was inside the drug store no one showed him a hat; the first time he ever saw the hat put into evidence by the Government was at No. 1 Precinct (Tr. 174).[2]

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[1] Dr. Tsangaris minimized the third possibility because no damage had been done to the rib (Tr. 154).

[2] The trial court observed that the hat was too small for appellant's head although appellant's hair was much longer at trial than on the day of arrest (Tr. 175-177).

On cross-examination appellant testified that he had left his home at approximately 10:30 p.m. on Friday night (Tr. 180). He did not return home before his arrest on Saturday morning. Appellant was not sure whether he shaved on Friday before leaving home[3] (Tr. 181). He further testified that he knew the man who took him to the dice game only by a nickname and did not know the name of anyone else at the dice game, although approximately thirty-five people were there (Tr. 182-184). Although he lost money at the game, appellant left the game with "48 or 50 dollars" (Tr. 185).

Ralph Durant, appellant's brother, testified that appellant rarely wore a hat (Tr. 195-196). According to Ralph, appellant worked for Standard Drug Company for approximately three weeks, during which time Ralph did not observe him wearing a hat (Tr. 196). He had never before seen the hat that was introduced into evidence by the Government (Tr. 197).

Officer Harry Charles Seanor of the Metropolitan Police testified that he arrived at the Standard Drug Store at approximately 7:00 o'clock in the morning on February 1, 1969 (Tr. 200). He was present when the hat introduced into evidence by the Government was tried on appellant's head (Tr. 202). However, he could not recall if the hat fit appellant (Tr. 203).[4]

At the close of the evidence the defense made a motion for a judgment of acquittal as to all counts (Tr. 214). The court denied the motion (Tr. 216).

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[3] A photograph of appellant taken two to three hours after his arrest was introduced (Tr. 179).

[4] The officer testified that he remembered a conversation with the prosecutor and defense counsel in which he said he did not know whether the hat fit. He stated at trial, however, that he had given it more thought and could not say for sure whether or not the hat fit (Tr. 209-210).

ARGUMENT

The evidence against appellant was sufficient to sustain a conviction of assault with a dangerous weapon and carrying a pistol without a license.

(Tr. 31, 42, 84, 93, 100-110, 117, 123-129)

Appellant challenges the sufficiency of the evidence against him. He argues that because of uncorroborated testimony from the victim, Mr. Mandell, as to his assailant's identity and because of inconsistencies in testimony the trial court committed error in allowing the jury to act. We submit the trial court properly decided that the testimony provided a question of fact which could be resolved by the jury.

On appeal, when a verdict is attacked for insufficiency of evidence, the reviewing court should examine the evidence in the light most favorable to the Government, making full allowance for the right of the jury to assess the credibility of witnesses and draw justifiable inferences of fact from the evidence presented at trial. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232, *cert. denied*, 331 U.S. 837 (1947). The Government is required only to introduce enough evidence so that a reasonable person *could* find guilt beyond a reasonable doubt. It is not required to introduce evidence which *compels* such a finding. *Crawford* v. *United States*, *supra*, 126 U.S. App. D.C. at 158, 375 F.2d at 334; *accord*, *Thompson* v. *United States*, 132 U.S. App. D.C. 38, 39, 405 F.2d 1106, 1107 (1968). Moreover, on appeal the "verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser* v. *United States*, *supra*, 315 U.S. at 80.

A review of Mr. Mandell's testimony at trial, we submit, exhibits a substantial basis upon which a jury could have decided that appellant was the man who shot him.

Mr. Mandell, relating the circumstanes of the assault, described the occurences on the first of February in a clear, credible manner. He admitted that he could not identify his assailant while he was standing at the bus stop (Tr. 100-110). Not until this man pushed him into his store, when in the rush the man's hat fell off and Mr. Mandell came face to face with him, did Mr. Mandell realize that the man before him was appellant, Emmanuel Durant. Appellant argues that this is a case of "a single accusatory statement by one witness that Emmanuel Durant shot him," and that "there is absolutely no other evidence in the record which has probative value in so far as establishing appellant's guilt" (Appellant's Brief at 17). We cannot agree.

The record reveals a positive identification by Mr. Mandell. It also provides substantial corroboration for Mr. Mandell's testimony[5] that six shots were fired (Tr. 84) by Officer Bazzle's testimony that, in addition to the one bullet taken from Mr. Mandell's body and the one shell described in the stipulation (Tr. 123-129), two shells were found outside the store and two inside the store (Tr. 117), making a total of five shells and one bullet recovered. The record also reveals testimony by Mr. Mandell that as soon as a police officer arrived on the scene, he informed the officer that Emmanuel Durant had shot him (Tr. 31).

As to Mr. Mandell's identification of appellant, the trial court ruled after a pre-trial hearing that there was a sufficient basis for the identification, and "it would be rather reckless . . . to say he could not recognize him" (Tr. 42). Certainly the jury could reasonably believe that Mr. Mandell had ample opportunity to identify a man who had been working for him for the last three weeks

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[5] We do not concede, of course, that corroboration is required. *Cf. Jones* v. *United States*, 124 U.S. App. D.C. 83, 361 F.2d 537 (1966); *Wigfall* v. *United States*, 97 U.S. App. D.C. 252, 230 F.2d 220 (1956); *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951); *Bullock* v. *United States*, 81 U.S. App. D.C. 271, 157 F.2d 702 (1946).

(Tr. 93), whom he drove home frequently, and who stood four feet from him in a well-lighted area (Tr. 93).

The testimony provided by the defense did not dilute the possibility that a reasonable person could find guilt beyond a reasonable doubt. Aside from presenting a credibility question, the defense merely provided the jury with some inconsistencies in testimony. Inconsistencies, like all matters relating to credibility, are exclusively within the domain of the jury. The jury performed its function under proper instructions and resolved these issues against appellant. Viewed in the light most favorable to the Government, the evidence was clearly sufficient to support the verdict and the conviction.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court be affirmed.

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